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No. 82-1029

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH S. IVERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a prior arbitral finding that petitioner stole money from the mails barred petitioner's action for malicious prosecution arising out of the same incident.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a-22a) is reported at 686 F.2d 410. The opinion of the district court (Pet. App. 7a-10a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1982, and a petition for rehearing was denied on September 22, 1982 (Pet. App. 23a). The petition for a writ of certiorari was filed on December 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was hired by the Postal Service as a part-time letter carrier in 1976. In May 1978, he became the subject of an investigation by the Postal Inspection Service after several customers on his mail route had complained

that mail addressed to them was never delivered. As is routine in such investigations, postal inspectors placed envelopes containing marked money in a collection box on petitioner's route. When the envelopes containing the marked money were not found among the mail petitioner brought back to his post office, he was arrested. The marked money was in petitioner's possession. Pet. App. 13a-15a.

As a result of the postal inspectors' investigation, petitioner was discharged from the Postal Service on May 26, 1978. Petitioner challenged his discharge by filing a grievance under the collective bargaining agreement between his union, the National Association of Letter Carriers, and the Postal Service. On December 20, 1978, following a hearing before an arbitrator at which both petitioner and the Postal Service were represented by counsel and had the opportunity to call witnesses, the arbitrator denied petitioner's grievance, concluding that he had stolen from the mails. Pet. App. 4a-6a, 13a, 18a-19a.

A criminal indictment also was returned against petitioner on July 19, 1978, charging him with theft from the mails by a Postal Service employee, in violation of 18 U.S.C. 1709. Petitioner was acquitted by a jury in the criminal case on January 5, 1979. Pet. App. 7a, 12a-13a.

2. Petitioner then initiated this action against the United States under the Federal Tort Claims Act for malicious prosecution in the bringing of the criminal action. The district court granted summary judgment against petitioner on the ground that the prior arbitral determination that petitioner had stolen from the mails collaterally estopped him from arguing that the government lacked probable cause to initiate the criminal proceeding, an essential element of a cause of action for malicious prosecution. Pet. App. 7a-10a.

The court of appeals affirmed (Pet. App. 12a-22a). The court noted (*id.* at 17a) that the absence of probable cause is a necessary element of an action for malicious prosecution and that that issue had been decided adversely to petitioner by the arbitrator: "In the arbitration proceedings, it was determined that the Postal Service not only had probable cause, but that [petitioner] actually pilfered the money from the mails." The court explained (*ibid.*) that petitioner's subsequent acquittal in the criminal case did not detract from this finding: "[I]n a criminal trial, the proof must be beyond a reasonable doubt, whereas, in civil proceedings, such as arbitration, the proof need be only by a preponderance of the evidence or by clear and convincing evidence. The fact of his acquittal merely means that the evidence against him was not beyond a reasonable doubt necessary to support his conviction." The court therefore concluded (*id.* at 18a) that, in the absence of any "suggestion that the arbitration procedures were unfair or that any statutory or contractual policies would provide an exception to the general rule favoring the finality of arbitration decisions between the same parties," the arbitral determination that petitioner had stolen from the mails collaterally estopped him from arguing that the government lacked probable cause to institute criminal proceedings against him.[1]

ARGUMENT

The court of appeals correctly applied settled law, and its decision conflicts with no decision of this Court or any other court of appeals. Further review therefore is not warranted.

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[1]The court of appeals also held that, even if petitioner were not collaterally estopped from litigating the probable cause question, he would lose on the merits (Pet. App. 19a): "[I]t would appear that the prosecution in the criminal case was * * * entitled to rely on the [arbitral] decision as a basis for establishing probable cause.

1. Petitioner does not challenge (Pet. 6) the general rule that precludes relitigation in a damages action of an issue previously decided by an arbitrator. See *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421 & n.18 (1966), citing *Bower* v. *Eastern Airlines, Inc.*, 214 F.2d 623 (3d Cir. 1954). He argues (Pet. 3-5), nevertheless, that this Court's decisions in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), establish an exception to the general rule whenever the damages claim is based on a federal statute. Petitioner's contention fails because it is based on an overly broad reading of the decisions on which he relies.

In *Gardner-Denver* and *Barrentine*, the Court held that a prior arbitral decision does not bar a claim arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, or the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (FLSA). In so holding, the Court carved out an exception to the general rule against relitigation of arbitral findings for claims based on federal statutes creating independent, substantive rights. *Barrentine, supra*, 450 U.S. at 737-739; *Gardner-Denver, supra*, 415 U.S. at 49-54. The court of appeals decisions on which petitioner relies (Pet. 4-5) likewise involve "rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Barrentine, supra*, 450 U.S. at 737. Moreover, the statutes at issue in those cases reveal an intent to "accord parallel or overlapping remedies," *Gardner-Denver, supra*, 415 U.S. at 47, which are "separate and distinct from the rights created through the 'majoritarian processes' of collective bargaining." *Barrentine, supra*, 450 U.S. at 738, citing *Gardner-Denver, supra*, 415 U.S. at 51.[2]

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[2]See, *e.g.*, *Becton* v. *Detroit Terminal of Consolidated Freightways*, 687 F.2d 140, 142 (6th Cir. 1982) (42 U.S.C. 1981); *Peabody Galion* v. *Dollar*, 666 F.2d 1309, 1320-1324 (10th Cir. 1981) (Oklahoma statute

By contrast, the Federal Tort Claims Act provides no substantive rights against the federal government. That statute was intended not to accord a parallel or overlapping federal remedy, but simply to eliminate the defense of sovereign immunity in certain cases in which a non-governmental entity would have been liable under existing state law. 28 U.S.C. 1346(b) and 2674. See *United States* v. *Muniz*, 374 U.S. 150, 153 (1963). Petitioner's cause of action is wholly a creation of state law.[3] Accordingly, the exception to the collateral estoppel rule articulated in *Gardner-Denver* and reaffirmed in *Barrentine* is inapplicable to petitioner's action under the Federal Tort Claims Act for malicious prosecution.

2. Petitioner also suggests (Pet. 7, quoting *Gardner-Denver, supra*, 415 U.S. at 53) that the arbitrator's decision against him was improperly "color[ed]" by " 'the law of the shop' " of both the Postal Service and the National Association of Letter Carriers to the effect that Postal Service employees must be "above suspicion." There is no evidence, however, that any such "law of the shop" entered into the arbitrator's decision. See Pet. App. 1a-6a. Based on the

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authorizing an action for damages against an employer who discharges an employee because he filed a workers' compensation claim); *Consolidation Coal Co.* v. *Marshall*, 663 F.2d 1211, 1218-1219 (3d Cir. 1981) (Federal Mine Safety and Health Act of 1977); *Air Line Pilots Association* v. *Northwest Airlines, Inc.*, 627 F.2d 272, 277-278 (D.C. Cir. 1980) (ERISA); *Marshall* v. *N.L. Industries, Inc.*, 618 F.2d 1220, 1222-1223 (7th Cir. 1980) (Occupational Safety and Health Act); *Stephenson* v. *NLRB*, 550 F.2d 535, 539-541 (9th Cir. 1977) (unfair labor practice provisions of the National Labor Relations Act). Cf. *Carothers* v. *Western Transportation Co.*, 554 F.2d 799, 806 (7th Cir. 1977) (suit under the Interstate Commerce Act for enforcement of an Interstate Commerce Commission order).

[3]As the court of appeals observed (Pet. App. 18a), "[b]oth federal and Michigan law would appear to give estoppel effect to issues actually litigated in an arbitral proceeding * * *."

evidence presented to him, the arbitrator simply "resolve[d] * * * the factual question[]" whether petitioner had stolen from the mails. *Barrentine, supra,* 450 U.S. at 743. Petitioner had a full and fair opportunity to challenge that factual allegation in the arbitral proceeding (Pet. App. 18a-19a).

Moreover, this Court's concern with "the law of the shop" was that its application by an arbitrator might undermine the congressionally mandated substantive protections of Title VII or the FLSA. See *Barrentine, supra,* 450 U.S. at 743; *Gardner-Denver, supra,* 415 U.S. at 57. Because the Federal Tort Claims Act creates no substantive rights, the "law of the shop" consideration does not apply here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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